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No. 87-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF WILLCOX, ARIZONA, and
ARIZONA ELECTRIC POWER COOPERATIVE, INC.
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court below erred in holding that the Federal Energy Regulatory Commission (FERC) has authority under Sections 5 and 7(e) of the Natural Gas Act (NGA) and under Section 311(c) of the Natural Gas Policy Act (NGPA), to impose common carrier status on interstate pipelines because they are exercising their statutory rights under, respectively, Section 7(c) of the NGA and Section 311(a) of the NGPA, to engage in transportation only for selected customers?

2. Whether the Court below erred in holding that FERC has authority under Section 311(c) of the NGPA to impose common carrier status on interstate and intrastate pipelines in view of the prohibition in Section 602(b)(2) of the NPGA against regulating such companies as common carriers under any provision of Federal or State law by reason of any NGPA transportation and in view of the prohibition of Section 601(a)(2)(A) and (B) of the NGPA against regulating, under the NGA, such pipelines or their transportation activities by reason of their NGPA transportation?

3. Whether the Court below erred in holding that FERC has authority under the NGPA and the NGA to achieve indirectly, by conditioning transportation authorizations, what it erroneously perceives to be the purposes of those Acts, which purposes it cannot achieve directly because of constitutional or statutory prohibitions or a lack of statutory authority?

PARTIES TO THE PROCEEDING

American Gas Association
American Iron and Steel Institute
American Paper Institute, Inc.
American Public Gas Association
Amoco Gas Company
ANR Pipeline Company
Arizona Electric Power Cooperative, Inc.
Ashland Exploration
Associated Gas Distributors
Atlanta Gas Light Company
Central Illinois Light Company
Chevron, U.S.A.
City of Willcox, Arizona
Colorado Interstate Gas Company
Columbia Gas Transmission Corporation
Consolidated Edison Company of New York
Consolidated Gas Transmission Corporation
Consumers Power Company and Michigan Gas Storage Company
CP National Corporation
Department of Public Service of the State of New York
El Paso Natural Gas Company
Elizabethtown Gas Company
Exxon Corporation
Federal Energy Regulatory Commission
Interstate Natural Gas Association of America
Kerr-McGee Corporation
Laclede Gas Company
Louisiana Interstate Gas Company
Maryland People's Counsel
Memphis Light, Gas and Water Division
Michigan Consolidated Gas Company

Minnesota Public Utilities Commission, *et al.*
Monterey Pipeline Company
National Association of Regulatory Utility Commissioners
Northern Natural Gas Company
Northwest Central Pipeline Corporation
Northwest Pipeline Corporation
Pacific Gas & Electric Company
Panhandle Eastern Pipeline Corporation
Pennzoil Company and Pennzoil Producing Company
Phillips Petroleum Company
Process Gas Consumers Group
Public Utilities Commission of the State of California
Shell Offshore, Inc. and Shell-Western E & P, Inc.
Southern California Gas Company
Southern Indiana Gas & Electric Company
Southern Natural Gas Company
State of Louisiana
Tenneco Oil Company
Tennessee Gas Pipeline Company
Texaco, Incorporated
Texas Eastern Transmission Corporation
Texas Gas Transmission Corporation
Transcontinental Gas Pipeline Corporation
Trunkline Gas Company
United Distribution Companies
United Gas Pipeline Company

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v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

City of Willcox, Arizona and Arizona Electric Power Cooperative, Inc. (jointly AEPCO) were lead petitioners below in the "Joint Initial Brief of Designated Petitioners Relative to Common Carriage Issues." AEPCO petitions for a *writ of certiorari* to review the decision of the United States Court of Appeals for the District of Columbia Circuit below in *Associated Gas Distributors, et al. v. FERC*, 824 F.2d 981 (Appendix A).[1] AEPCO also seeks summary disposition of that decision.

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[1] References to the Appendix are to the Appendix of the Interstate Natural Gas Association of America and other parties, including these petitioners, filed by that petitioner with its petition for certiorari with respect to the decision of the Court below. References to the Appendix shall be designated (App. ___).

The decision of the Court below vacated Order 436 of the Federal Energy Regulatory Commission (FERC or Commission) issued in a rulemaking proceeding entitled "Regulation of Natural Gas Pipelines After Partial Wellhead Deregulation", Docket No. RM85-1.

These Orders relate to the imposition of an "open access" condition on grants of authority to transport gas owned by a shipper under the Natural Gas Policy Act (NGPA), 15 U.S.C. §3301, *et seq.*, and the Natural Gas Act (NGA), 15 U.S.C. §717, *et seq.* The Court below affirmed the statutory power of the Commission to impose this condition but found the Order deficient in other respects. The Court vacated Order 436 in its entirety because of the limited defective portions of the regulations. (App. 123a-124a)

On July 17, 1987, the Court granted FERC's request to stay one portion of the regulations that the Court found deficient on the understanding that FERC would promptly issue interim regulations to avoid a regulatory gap. (App. 141a-143a) On August 7, 1987, the Commission issued Order 500[2] which included new regulations designed to cure the defects found by the Court. Thus, the regulations requiring non-discriminatory access, 18 C.F.R. §§284.8, 284.9 (App. 134a-136a), which were originally promulgated in Order 436 have survived the Court's mandate and are currently in operation. The open access regulations and the Court's affirmance of FERC's statutory power to issue them, therefore, are final and ripe for Supreme Court review.

ORDERS AND OPINIONS BELOW

The Order of the United States Court of Appeals for the District of Columbia is reported at 824 F.2d 981 (D.C.

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[2] Order No. 500, 52 Fed. Reg. 30,334 (Aug. 14, 1987), FERC Stats. & Regs. (CCH) ¶39,761.

Cir. 1987) and is reprinted in Appendix A. The Orders of the Commission are reported as follows: Order 436, 50 Fed. Reg. 42,408 (October 18, 1985), FERC Stats. & Regs. (CCH) ¶30,665; Order 436-A, 50 Fed. Reg. 52,217 (Dec. 23, 1985), FERC Stats. & Regs. (CCH) ¶30,675; Order 436-B, 51 Fed. Reg. 6,398 (Feb. 24, 1986), FERC Stats. & Regs. (CCH) ¶30,688; Order 436-C, 51 Fed. Reg. 11,566 (April 4, 1986), 34 FERC (CCH) ¶61,404; Order 436-D, 51 Fed. Reg. 11,569 (April 4, 1986), 34 FERC (CCH) ¶61,405; Order 436-E, 51 Fed. Reg. 11,566 (April 4, 1986), 34 FERC (CCH) ¶61,403.

JURISDICTION

The judgment of the court of appeals (App. A) was issued on June 23, 1987. Timely petitions for rehearing and suggestions for rehearing *en banc* were denied on September 15, 1987. (App. 145a, 148a) The mandate of the Court below was also issued on that date. (App. 145a)

The jurisdiction of this Court is invoked under Section 19(b) of the NGA, 15 U.S.C. §717r(b); Section 506 of the NGPA, 15 U.S.C. §3416; and 28 U.S.C. §1254(1).

PROVISIONS OF STATUTES AND REGULATIONS

The Statutes upon which the Court of Appeals' decision was based are the Natural Gas Act, 15 U.S.C. §§717, *et seq.*, and the Natural Gas Policy Act of 1978, 15 U.S.C. §§3301, *et seq.*, relevant portions of which appear in Appendix D. Section 601(a)(2) of the NGPA, 15 U.S.C. §3431(a)(2), is reproduced in the Addendum to this petition. The Regulations involved are contained in 18 C.F.R. §§284.8 and 284.9 and appear in Appendix B at 134a-136a.

STATEMENT OF THE CASE

Petitioners, City of Willcox, Arizona and Arizona Electric Power Cooperative, Inc., are, respectively, direct and

indirect customers of El Paso Natural Gas Company, an interstate pipeline. AEPCO filed a timely application for rehearing of Order 436. AEPCO's application for rehearing was denied on December 12, 1985, when the Commission issued Order 436-A in which it denied rehearing of all issues raised by petitioners. 50 Fed. Reg. 52,217. AEPCO thereupon filed timely petitions for review under §19 of the NGA and §506 of the NGPA with the Courts of Appeals for the Fifth and District of Columbia Circuits. The former petition for review was transferred to the District of Columbia Circuit and both were consolidated with all other petitions for review of Order 436. The Court below issued its opinion denying Willcox' petition for review on June 23, 1987. (App. A) Rehearing was denied and the mandate was issued on September 15, 1987. (App. 145a-146a)

In 1938, Congress enacted the NGA, 15 U.S.C. §717, *et seq.*, 52 Stat. 821. The NGA as originally enacted gave the Commission power to review the rates, practices and contracts of regulated pipelines. If upon review a pipeline rate, practice or contract was found to be unjust, unreasonable, unduly discriminatory or preferential, the Commission could establish a new rate, practice or contract. The NGA as originally enacted provided in §7 that a pipeline could expand its system or offer new sales or transportation services as it desired without the need for any Commission approval except when the pipeline desired to serve an area already served by another pipeline. Except in the limited circumstances provided in §7(a) the Commission had no authority to compel a pipeline to provide any service.[3]

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[3] Section 7(a) provides that the Commission may after notice and hearing order a pipeline to extend its facilities, establish physical interconnection with and sell gas to a local distribution company which is "immediately adjacent to such facilities or to territory served" by the pipeline. The Commission is prohibited from ordering any compulsory enlargement of facilities, or any physical connection, or any sale

In 1942, Congress amended §7 of the NGA, 15 U.S.C. §717f, and added the certificate provisions which are now in effect, 56 Stat. 83. Section 7(c), as amended, provides that a pipeline may not expand its system or offer new service without a certificate authorization from the Commission. In order to obtain such approval, it must file an application with the Commission. Section 7(e) provides that if the applicant is qualified and if the proposed sale, transportation service or expansion of facilities is required by the public convenience and necessity, the Commission must issue the certificate. However, §7(e) also gives the Commission power to impose reasonable terms and conditions on such a certificate. If the pipeline is not willing to accept the conditions, it may refuse to accept the certificate. The Commission has no power, though, except in the limited conditions defined in §7(a), to compel a pipeline to offer service it does not wish to offer. *FPC v. Transcontinental Gas Pipe Line Co.*, 365 U.S. 1, 17 (1961). Thus, prior to the enactment of the NGPA, a pipeline could not transport gas for anyone without first applying for and obtaining a certificate.

In 1978, Congress enacted the NGPA, 15 U.S.C. §3301, *et seq.*; 92 Stat. 3368. The NGPA provided for the end of NGA price regulation over any natural gas supplies, the immediate price regulation of all domestic natural gas supplies and the gradual deregulation of certain new gas supplies. The NGPA also provided, in §311(a), 15 U.S.C. §3371(a), that interstate pipelines could transport natural gas on behalf of intrastate pipelines and local distribution companies (LDC's) without obtaining an NGA certificate. The NGPA further provides, §311(c), 15 U.S.C. §3371(c), that such transportation is subject to such terms and conditions as FERC may impose. However, the NGPA expressly prohibits FERC from subjecting any person "to

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"when to do so would impair [the pipeline's] ability to render adequate service to its customers."

regulation as a common carrier under any provision of Federal or State law by reason of any [NGPA] transportation." §602(b)(2), 15 U.S.C. §3432(b)(2). The NGPA also expressly prohibits FERC from regulating, under the NGA, transportation service authorized under §311(a) of the NGPA or from regulating, under the NGA, pipelines providing service thereunder. §601(a)(2)(A) and (B), 15 U.S.C. §3431(a)(2)(A) and (B).

After enactment of the NGPA, FERC promulgated final rules pertaining to §311(a) transportation by interstate and intrastate pipelines pursuant to individual contracts between the pipeline and each customer. Order No. 46, 44 Fed. Reg. 52,179 (Sept. 7, 1979). These regulations, *inter alia*, permitted interstate pipelines, without prior agency approval, to transport natural gas for any intrastate pipeline or LDC for up to two years under each contract. At this time, the Commission refused to require pipelines to transport gas for LDC's. The Commission's first and almost contemporaneous reading of the NGPA in Order 46 (44 Fed. Reg. 52,180-81) was as follows:

> There is no indication in section 311(a)(1), or in its legislative history, that interstate pipelines were intended to be required to render transportation services. Indeed, section 602(b)(2) specifically states that no person shall become a common carrier by reason of section 311(a) transportation. Thus, the Commission is without authority to require transportation services by interstate pipelines solely by reason of section 311(a)(1).

On October 9, 1985, FERC promulgated Order 436. Order 436 provided in pertinent part that a pipeline could obtain a "blanket certificate" under NGA §7 to provide gas transportation service to any person who desires such service. 18 C.F.R. Part 284, Subpart G. But a pipeline which accepts such a certificate must also provide trans-

portation service to any other person desiring such service. The Commission stated that it would continue to process on a case-by-case basis individual §7 transportation applications for those pipelines which did not seek blanket certificate authority and that it would police such applications to prevent discrimination by a pipeline among its customers. 50 Fed. Reg. 42,428. It claimed that its power under NGA §5(a) to remedy undue discrimination gave it authority to grant, deny, or condition certificates so as to relieve undue discrimination. 50 Fed. Reg. 42,427. The Commission has uniformly conditioned the granting of individual certificate applications upon the pipeline's agreement to request certificates for all who desire them.[4] Thus, a pipeline can only obtain a transportation certificate for one customer by agreeing to become an "open access" carrier which transports gas for all comers. In addition, the Commission has generally restricted such certificates to one year terms.[5]

In Order 436, FERC also imposed the open access condition upon transportation under NGPA §311(a). FERC held that a pipeline wishing to provide transportation under §311(a) may have a blanket authorization to do so, but, as in the case of a §7 blanket certificate, must transport for any intrastate pipeline or LDC requesting such service. However, unlike an NGA §7 blanket certificate—where a pipeline must request abandonment authority before it stops providing service—a pipeline providing service under §311(a) may terminate such service at any time. 50 Fed. Reg. 42,434. Order 436 also eliminated the pipeline's option of applying for individual §311(a) authorizations which did not meet the open access conditions. 50 Fed. Reg. 52,230. Such non-conforming individual applications

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[4] *See, e.g., ANR Pipeline Co.*, 41 FERC ¶61,043, Opinion No. 288 (October 20, 1987).

[5] *See, e.g., Florida Gas Transmission Co.*, 41 FERC ¶61,267 (December 4, 1987).

were permitted in the original regulations implementing §311(a), 18 C.F.R. §284.107 (1979).

REASONS FOR GRANTING WRIT

AEPCO respectfully submits that the Court below should be summarily reversed because it has clearly erred in deciding important federal questions concerning the administration of the Natural Gas Act and the Natural Gas Policy Act and their interrelationship in a way that authorizes FERC, by rule, to violate an express prohibition in the NGPA. The decision below is also in direct conflict with two decisions of this Court, decisions of two other Circuit Courts of Appeals, and has so far departed from the accepted and usual course of judicial proceedings as to call for *per curiam* reversal by this Court. The issues AEPCO raises herein are dispositive of the dependent issues relative to Order 436 raised by other parties which are not yet ripe for review.[6] The public interest, as well as judicial economy, will be served by summary disposition which will end the existing uncertainty and disruption of gas markets during the pendency of Supreme Court review.

1. The Court below held that Order 436 ". . . envisages a complete restructuring of the natural gas industry . . . [and] . . . may well come to rank with the three great milestones of the industry . . .". (App. 17a). It is undisputed that this is a case of great national importance which will govern the future course of this industry and affects directly independent producers, interstate and intrastate pipelines, local distributors and consumers of gas. Until Order 436, both the NGA and the NGPA had been uniformly construed by the Commission and by the Courts to recognize that interstate pipelines are not common carriers obliged to serve all comers, but serve only customers

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[6] These issues are dispositive because the open access provision is the "cornerstone" of Order 436 (App. 132a) and all of the regulations are "interdependent" (App. 124a).

of their own choosing. This Court has held that the Commission lacks statutory authority to initiate service by ordering a natural gas company to sell or transport gas to any particular user or group of users, except in the limited situations specified in §7(a) of the Act. *Transcontinental Gas*, 365 U.S. at 17. As the Court below recognized, any pipeline which actually provides transportation under §311 of the NGPA or accepts a "blanket certificate" to provide transportation under §7 of the NGA must grant "open-access" to all comers. (App. 24a) Furthermore, the Commission has uniformly applied the open-access requirement of Order 436 to every application by an interstate pipeline for an individual certificate authorizing transportation to a single customer or to a group of customers.[7] Thus, Order 436 is intended to, and if affirmed, will radically transform pipelines from purveyors of sales gas (the merchant function)[8] to transporters of customer owned gas (the common carrier function). (App. 17a)

2. The decision below is squarely in conflict with this Court's decision in *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). AEPCO argued below "that a duty to provide service to all comers (*i.e.*, open access) is the essence of common carriage" (App. 27a).[9] Consequently, AEPCO as-

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[7] *See ANR Pipeline, supra*, at n. 4.

[8] Pipelines purchase gas for resale to their customers and resell such gas at cost. Such sales service has been the traditional role of pipelines during the entire life of the industry which antedates the 49 years of NGA regulation.

[9] In *Midwest Video*, this Court held that the denial of a carrier's right to "make individualized decisions, in particular cases, whether and on what terms to deal" transforms it into a common carrier under the applicable common law test of *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976), and *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976). 440 U.S. at 701.

serted that Order 436 was unlawful since the NGA does not expressly authorize the FERC to impose common carriage on pipelines and prior legislative refusals to grant FERC this power imply an intention by Congress to prohibit FERC from doing so. The Court below did not disagree that open access is common carriage but rejected our argument on the ground that *Midwest Video* was distinguishable because the agency enabling act there—the Communications Act—had a specific statutory prohibition on the imposition of common carriage obligations which the NGA lacked. The argument employed by the Court below demonstrates the error of the Court's rejection of AEPCO's arguments with respect to the NGPA which contains a specific statutory prohibition against the imposition of common carrier status very similar to the one in *Midwest Video.*

Section 602(b)(2) of the NGPA provides, in pertinent part:

> No person shall be subject to regulation as a common carrier under any provision of Federal or State law by reason of any transportation—
>
> * * * * *
>
> (2) authorized by the Commission under section 311(a) of this Act.

Thus, in both the NGPA and the Communications Act there is an express prohibition on imposition of common carrier obligations, and this case is clearly controlled by *Midwest Video.*

In fact, the holding of the Court below on §602(b)(2) violates a basic rule of statutory construction that "[s]pecific terms prevail over the general". *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957). The prohibition is specific; a power to prevent discrimination, if it exists at all, is general. Moreover, there is no provision in the NGPA, similar to Sections 4 and 5

of the NGA, which confers upon the Commission, or even refers to, authority to eliminate discrimination.

3. The decision below is also squarely in conflict with *Midwest Video* in another vital respect. The Court below rejected AEPCO's challenges to the imposition of an open access condition under §311(c) on the ground that §602(b)(2) of the NGPA was intended only to protect intrastate and interstate pipelines from regulation as common carriers but it was not intended to deprive FERC of authority to prevent undue discrimination. The Court below admitted that common carrier regulation was prohibited generally but stated that this prohibition was utterly different from a "duty not to discriminate, imposed by the Commission on the basis of findings that the duty is necessary to assure consumers access to competitively priced gas." (App. 35a) Thus, the basic rationale of the Court below is that the express prohibition against the regulation of interstate pipelines as common carriers is irrelevant because FERC's regulations facilitate the accomplishment of Congress' purpose. *Id.*

In *Midwest Video*, this Court, on parallel facts, expressly rejected the very same rationale advanced by the FCC to justify a rule imposing open access requirements in contravention of a statutory prohibition against common carriage. Thus, in *Midwest Video*, 440 U.S. at 702, this Court held:

> [T]he Commission continues to insist that this [common carrier] characterization of the obligation imposed by the rules is immaterial to the question of its power to issue them; its authority to promulgate the rules is assured, in the Commission's view, so long as the rules promote statutory objectives.
>
> Congress, however, did not regard the character of regulatory obligations as irrelevant to the determination of whether they might per-

> missibly be imposed in the context of broadcasting itself.
>
> The Court went on, *id.* at 705:
>
> The language of § 3 (h) is unequivocal; it stipulates that broadcasters shall not be treated as common carriers.
>
> * * * * * * * *
>
> It is difficult to deny, then that forcing broadcasters to develop a "nondiscriminatory system for controlling access . . . is precisely what Congress intended to avoid through § 3 (h) of the Act. (Citations omitted.)

4. The decision below expands the purpose of the NGPA beyond the intent of Congress. The Court's rationale upholding the Commission's authority to impose common carriage is based on the erroneous assumption that the purpose of the NGPA was to promote competition at the point of delivery to the consumer or LDC. The Court below rejected AEPCO's challenges to the open access condition of Order 436, insofar as it implemented the NGPA, on the ground that this condition promoted the purposes of that statute. (App. 35a-39a) This was the theory on which the Court held that the open access condition did not violate the prohibition of §602(b) against regulation of any person as a common carrier and the exemption of §601(a)(2) of interstate transporters from NGA regulation. Thus, the Court below held that the imposition of a duty to provide non-discriminatory open access "facilitates the accomplishment of Congress's purposes" as to §602(b)(2) (App. 35a) and "make[s] sure that §311 transportation operates in harmony with the congressional purpose." (App. 38a)

The purpose of the NGPA that the Court believed FERC was promoting was "assuring consumers access to *competitively* priced gas." (App. 35a) (emphasis added). The

Court's discussion in Part B of its Opinion entitled "Regulatory and Economic Context" is replete with references to competition. (App. 20a-24a) But, the true purpose of the NGPA is much more limited. The purposes of the NGPA need not be the subject of speculation. The "President's Bill", contained findings and purposes which clearly define the extremely limited scope of the NGPA and demonstrate that it was not intended to promote competition in either the interstate or intrastate pipeline fields. H.R. 6831, 95th Cong., 1st Sess. §§401(a)(b) (1977). Thus, the purposes of the Act as stated in Section 401(b) of House Bill 6831 are 1) balancing gas demand-supply by establishing an incentive based pricing approach for new natural gas, 2) dealing with short term supply shortages of gas through the extension of the allocation provisions of the Emergency Natural Gas Act of 1977 and 3) promoting conservation of gas by pricing gas to certain industrial and other users at a higher level to provide incentives for conversion to other more plentiful fuels and for conservation.

The findings and purposes specified by the President's Bill were adopted without change by the House in the National Energy Act. H.R. 8444, 95th Cong., 1st Sess., §401(b) (1977). The bill that was later enacted as the NGPA did not contain any comparable provision. H.R. 5289, 95th Cong., 1st Sess. (1977). However, the Introduction to the Joint Explanatory Statement of the Committee on Conference explains that the Bill was concerned with natural gas pricing policy, extended authority for emergency allocation of natural gas, and authority for unregulated intrastate pipelines and LDC's to sell gas on the interstate market. S. Rep. No. 1126, 95th Cong., 2nd Sess. 67-68 (1978). Not a single word in the Introduction or any of the other sections of the Conference Committee Report mentions as a purpose of the Act the elimination of discrimination in either the intrastate pipeline transportation field or the interstate pipeline transportation field.

Later Court and Commission interpretations of the scope and purposes of the NGPA are completely consistent with this extremely restrictive view of its intended purposes. As the Fifth Circuit held in *Mid-Louisiana Gas Co. v. FERC*, 664 F.2d 530, 535 (1981), *aff'd. sub nom. Public Service Commission of the State of New York v. Mid-Louisiana Gas Co.*, 463 U.S. 331 (1983), "[t]wo of the overriding purposes of the NGPA were to eliminate the dual interstate and intrastate market for natural gas and to provide higher prices to encourage production." Neither of these purposes deals with the elimination of a pipeline's right to choose with whom it will deal.

The Commission itself held, in Order 436, (50 Fed. Reg. 42,429) that:

> Section 311(c) must be read in light of the fundamental intention of the NGPA to facilitate the movement of gas between the intrastate and interstate markets following a period of severe curtailment of interstate supplies coincident with ample intrastate supplies.

At the time the NGPA was enacted, there was a shortage of gas in the interstate market despite a glut in the intrastate market because of regulatory obstacles to the free flow of gas between those markets. 50 Fed. Reg. 42,429. In the NGPA, Congress intended to facilitate the movement of gas from the intrastate to the interstate market by (1) authorizing in §311(a) both interstate and intrastate pipelines to transport gas for each others' markets, (2) prohibiting the Commission in §601(a)(2) from applying its onerous NGA regulation to transportation authorized under §311(a) and (3) prohibiting the Commission in §602(b)(2) from subjecting pipelines which offered §311(a) transportation authority to regulation as a common carrier.

As the Court below expressly recognized, the purpose of §602(b)(2) was "to protect §311(a) from the consequences of pipeline concern that service thereunder would

expose them generally to classification as common carriers.. . .". (App. 35a) As the Court below also expressly recognized, the purpose of "[s]ection 602(a)(2)(A) (sic) [was] clearly intended to assure that pipelines' fear of the *automatic* imposition of the burdens of NGA jurisdiction does not make them so chary of §311 that it languishes unused." (App. 38a) Clearly, Congress recognized that the voluntary cooperation of both interstate and intrastate pipelines depended upon *relieving* them of new or additional federal and state regulatory burdens. Yet, the Court below has construed these very sections of the NGPA as permitting the imposition of such burdens so long as the Commission acts to promote the anti-discrimination policies of the NGA—which have no counterpart in the text or legislative history of the NGPA.

5. The decision below is in square conflict with one of the most fundamental tenets of administrative law. This general rule, restated in *Lyng v. Payne*, ___ U.S. ___, 106 S.Ct. 2333, at 2341 (1986), is that the Commission and every other agency of the United States created by Congress has only those powers granted to it by Congress in its organic statutes. AEPCO emphasized below the absence of any express grant of authority in the NGA to regulate interstate pipelines as common carriers. The Court below rejected this argument by inverting the established doctrine and holding that the Commission had the authority to impose common carrier status on pipelines unless there was express language in the NGA barring the Commission from taking such action. (App. 25a-27a)

In reaching its conclusion, the Court gave no weight to the fact that it took the Commission approximately fifty years to "discover" that the refusal of a pipeline to provide service to all comers was *per se* unduly discriminatory. Thus, the Court below flouted this Court's ruling, in a case involving the same statute at issue here, that a "failure to use such an important power for so long a time . . . indicates that the Commission did not believe the power

existed." *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513 (1949). The principle underlying *Panhandle* has recently been reaffirmed by this Court in *Bankamerica Corporation v. U.S.*, 462 U.S. 122 (1983).

The Court below attempted to distinguish *Panhandle* on the ground that "the Commission here deals with conditions that are altogether new" so that no inference can be drawn from prior non-use. (App. 33a) The Court's statement is not supported by any record facts and is contrary to facts which this Court may judicially notice. Large pipeline customers have always sought the privilege of having gas they purchase in the field from producers transported by a pipeline. *Transcontinental Gas Pipe Line, supra.* This demand reaches a peak whenever the field price of gas is below the pipeline's system average cost of gas which reflects prices in contracts entered into during periods of gas shortage. But the present "gas bubble" is not "altogether new". It has existed since shortly after the Congress, in the NGPA, enacted higher price ceilings for new gas and terminated NGA price regulations of all gas.

Even if the nature of the natural gas industry had changed, it would be the function of Congress, and not the FERC or the Court below, to amend the statutes to provide a legislative mandate for common carriage. When the Congress enacted the NGPA, it knew how to enact a law requiring common carriage if that was its intention. In 1978, the year the NGPA was enacted, the Congress amended the Outer Continental Shelf Lands Act to provide specifically in §5(f), 43 U.S.C. §1334(f)(1)(A), that natural gas pipelines that are granted a right-of-way on or across the Outer Continental Shelf "must provide open and nondiscriminatory access to both owner and non-owner shippers." Its failure to so provide in the NGPA is a clear indication of its lack of intent to so legislate.

Moreover, in the last five years, numerous bills have been introduced which would have conferred upon the Commission the authority to order some form of common

or contract carriage.[10] If the Commission already possessed this authority, these bills would have been unnecessary.

6. The Court below sustained FERC's statutory power to condition NGA transportation authorizations on a basis which, unless reversed, will make it impossible for the agency to treat the electric and gas industries alike, with respect to common carriage. This discrimination will have serious repercussions in the electric power industry.

The Court below created a novel and unsupported distinction between Congressional action directly imposing common carrier status on pipelines, on the one hand, and action granting the Commission discretion to impose "obligations encompassing the core of a common carriage duty" on the other. (App. 26a, 28a-29a) On this basis, it rejected the reliance of AEPCO and other petitioners on *Florida Power & Light v. FERC*, 660 F.2d 668 (5th Cir. 1981), *cert. denied*, 459 U.S. 1156 (1983), and *Richmond Power & Light v. FERC*, 574 F.2d 610 (D.C. Cir. 1978) which hold that FERC lacks authority to impose common carriage on electric utilities directly or indirectly. The Court below distinguished the cited cases on the ground that the legislative history of the Federal Power Act is "materially different" from that of the NGA. Thus, the Court held at App. 28a:

> In its deliberations on the bill that ultimately emerged as the Federal Power Act, Congress considered and rejected a provision that would have "empowered the Federal Power Commission

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[10] *See* Mogel & Gregg, *Appropriateness of Imposing Common Carrier Status on Interstate Natural Gas Pipelines*, 4 Energy L.J. 155, 176-79 (1983). *See also* S. 2285, 99th Cong., 2nd Sess. (1986) (Committee on Energy and Natural Resources); S. 834, 99th Cong. 1st Sess. (1985) (to Subcommittee on Energy Regulation and Conservation); H.R. 511, 99th Cong., 1st Sess. (1985) (to Subcommittee on Fossil and Synthetic Fuels); H.R. 2734, 99th Cong., 1st Sess. (1985) (to Subcommittee on Fossil and Synthetic Fuels).

> to order wheeling if it found such action to be 'necessary or desirable in the public interest.' " *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973) (quoting S. 1725, 74th Cong., 1st Sess.). The evidence as to the NGA (surveyed above) is less direct: it consists exclusively of various occasions on which Congress did not adopt proposals actually making the natural gas pipelines into common carriers.

This analysis of the legislative history is totally wrong. In fact, there is *no* difference between the history of the Power Act and the NGA. Furthermore, the proposed provisions dealing with common carrier status for pipelines and electric utilities are identical in every respect, except that the one refers to electricity and the other to gas, and were contained in one bill (which ultimately became the Federal Power Act) which proposed to regulate both electric utilities and pipelines.

As the Commission noted in Order 436 (50 Fed. Reg. 42,428), Congress, during its consideration of the NGA considered and rejected language which would have imposed common carrier obligations on pipelines. In particular, the Commission made reference to §§303 and 304 of H.R. 5423, 74th Cong., 1st Sess. (1935).

Those sections stated:

> Section 303(a). *It shall be the duty of every distributor to* furnish natural gas, to exchange natural gas with, and *transmit natural gas for any person upon reasonable request* therefor; and to furnish and maintain such services and facilities as shall promote the safety, comfort and conveniences of all its customers, employees, and the public, and shall be in all respects adequate, efficient and reasonable.

> Section 304. Whenever the Commission after notice and opportunity for hearing finds such action necessary or desirable in the public interest, *it may by order direct a distributor* to make additions, extensions, repairs, or improvements to or changes in its facilities, to establish physical connection with the facilities of one or more persons, to permit the use of its facilities by one or more persons, or to utilize the facilities of, sell natural gas to, purchase natural gas from, *transmit natural gas for*, or exchange natural gas with *one or more other persons*. (Emphasis added)

The identical portions of the proposed Power Act which were rejected by Congress are found in §§202(a) and 203(b) of H.R. 5423, 74th Cong., 1st Sess.

Those sections provided:

> "SEC. 202. (a) *It shall be the duty of every public utility to* furnish energy to, exchange energy with, and *transmit energy for any person upon reasonable request* therefor; and to furnish and maintain such services and facilities as shall promote the safety, comfort, and convenience of all its customers, employees, and the public, and shall be in all respects adequate, efficient, and reasonable.
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> * * * * * * * * *
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> "SEC. 203. (b) Whenever the Commission after notice and opportunity for hearing finds such action necessary or desirable in the public interest, *it may by order direct a public utility to* make additions, extensions, repairs, or improvements to or changes in its facilities, to establish physical connection with the facilities of one or more other persons, to permit the use of its facilities by one or more other persons, or to utilize the facilities

> of, sell energy to, purchase energy from, *transmit energy for*, or exchange energy with, *one or more persons*. (Emphasis added)

Furthermore, the identical common carrier provisions rejected by Committees of both Houses of Congress relating to both pipelines and electric utilities, were contained in the same Bills—H.R. 5423 and S. 1725 (which were identical), 74th Cong., 1st Sess., and were rejected at the same time for the same reason. That reason was that the proposed provisions made pipelines and utilities into common carriers and empowered the Commission to require, in its discretion, those entities to provide transmission service over their facilities. Thus, the Senate Report, S. Rep. No. 621, 74th Cong., 1st Sess. 19 (1935) states:

> While imposition of these duties may ultimately be found to be desirable, the committee does not think that they should be included in this first exercise of Federal power over electric companies. It relies upon the provision for the voluntary coordination of electric facilities in regional districts contained in the new section 202(a). (formerly sec. 203(a)), for the first Federal effort in this direction . . . Furthermore, the provisions of the old section 203(b) empowering the Federal Power Commission to require one utility to permit the use of its facilities by another, or to make extensions or improvements have been eliminated; these matters are left to the voluntary action of the utilities.

In *Florida Power & Light Co. v. FERC*, 660 F.2d 668, 672-73 (5th Cir. 1981), *cert. denied*, 459 U.S. 1156 (1983), the Court of Appeals for the Fifth Circuit relied upon this same legislative history of the Power Act in denying the Commission authority to impose compulsory wheeling on a utility.

7. The decision below is squarely in conflict with the decision of the Fifth Circuit in *Florida Power & Light Co., supra*, and the decision of the Third Circuit in *Central West Utility Co. v. FPC*, 247 F.2d 306 (3d Cir. 1957).

Florida Power held that the Commission cannot use its statutory authority to prevent undue discrimination under §206(a) of the Federal Power Act to indirectly impose by condition a duty to wheel power[11] upon electric utilities. We have already shown, *supra*, at 18-20, that the histories of the Federal Power Act and the NGA are identical. In addition, the two Acts are in *pari materia*, and §206 of the Federal Power Act is substantially identical to §5 of the NGA. *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 350 (1956). Thus, the effort of the Court below to distinguish *Florida Power* must fail.

In *Florida Power*, the Commission ordered an electric utility to include in uniform filed tariffs the utility's policy statement that it would offer transmission services (*i.e.*, wheel power) to all neighboring utilities provided that four conditions were met. The utility challenged the order on the ground that such a tariff, by requiring it to offer wheeling to all customers, would convert it into a common carrier and thus was beyond the statutory authority of the Commission. 660 F.2d at 669.

The Fifth Circuit reversed the Commission, *citing Richmond Power & Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978), on the ground that the Commission's §206(a) power to modify the terms of unduly discriminatory contracts did not justify compulsory wheeling imposed by a condition on the grant of an authority sought by the electric utility. Thus, the Fifth Circuit held (660 F.2d at 673):

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[11] Wheeling is the electrical analog of gas transportation. This Court has defined wheeling as the "transfer by direct transmission or displacement [of] electric power from one utility to another over the facilities of an intermediate utility". *Otter Tail Power Co. v. U.S.*, 410 U.S. 366, 368 (1973).

In *Richmond*, a utility attempted unsuccessfully to convince the Commission that rates proposed in a national, voluntary program to transmit coal-generated power from the mid-west to the oil-short east were unreasonable because the utilities had submitted rates only for voluntary wheeling. The utility argued that the Commission's authority to reject unreasonable rate proposals and to set reasonable rates included the power to condition approval of the proposed rates on involuntary wheeling. The District of Columbia Circuit concluded the Commission had acted properly, stating:

> If Congress had intended that utilities could inadvertently bootstrap themselves into common carrier status by filing rates for voluntary service, it would not have bothered to reject mandatory wheeling in favor of a call for just such voluntary wheeling. 574 F.2d at 620.

The Court below agreed that *Richmond* held "... that willingness to transmit for all comers could not be automatically deemed an undue discrimination," and "the Commission's rejection of a *per se* rule (*i.e.*, a rule that selective transmission was necessarily undue discrimination) followed logically from Congress's refusal to impose common carrier duties on electric utilities." (App. 29a)

Thus, both the Fifth Circuit and the District of Columbia Circuit have held that when an electric utility exercises its right as a *private carrier* to refuse to deal with all comers, on uniform terms, it is not *per se* unduly discriminatory. Furthermore, the basic principle on which the Fifth Circuit rejected the Commission's claim in *Florida Power*, that its anti-discrimination powers overrode the electric utility's rights to select its own customers and specify its own terms of service, was that Congress had specifically

given the companies these rights by its refusal to make them common carriers.

The District of Columbia Circuit accepted this basic principle in *Richmond* but rejected it in the instant case. The very same principle was applied to the NGA by the Court of Appeals for the Third Circuit in *Central West, supra.* *Central West* affirmed the Commission's refusal to impose a certificate condition desired by a customer who objected to the pipeline's voluntary enlargement of certain lateral lines to serve one group of customers while refusing the same service to the objecting party. The Third Circuit held that where Congress had not deprived the utility of its due process constitutional right to selectively choose whether or not to expand its facilities to serve a particular customer, its voluntary expansion to serve some customers while denying the same type of service to other customers could not be held to be undue discrimination under §5(a). The Court's rationale was that the pipeline's action in making "a decision which [one part of] the Act permitted Panhandle's stockholders and directors to make in the exercise of their own judgment wholly uncontrolled by the Commission" could not be a violation of another part of the Act. 247 F.2d at 312. In *Central West*, as in the instant case, the Commission's limited powers to order expansion of facilities and service, under §7(a), did not apply.

Both cases expose the fallacy of the decision below that the anti-discrimination policy objectives of the NGA override the Commission's duty under §7(e) to grant an application for a certificate where the public interest so requires and that its power to condition such certificates can be used to override a pipeline's due process right and statutory right to conduct its business affairs in a manner which it believes strikes a proper balance between the interests of its customers and shareholders.

9. The Court below avoided the proscription against common carriage by focusing instead on the Commission's

conditioning authority under both Acts to eliminate undue discrimination. Thus, the Court approved FERC's authority to attach an open access condition under Section 311(c) of the NGPA despite an express prohibition against common carriage in that Act and to attach a similar condition under Section 7(e) of the NGA notwithstanding the lack of specific authority and an implied prohibition against common carriage arising from Congress' rejection of common carrier legislation in the NGA. (App. 25a-26a; 37a) The Court's broad interpretation of the Commission's generalized conditioning authority is contrary to established law and, if not reversed, threatens to invite the FERC, as well as other agencies,[12] to use its conditioning authority under its organic statutes to further its policies irrespective of Congressional mandate.

This Court and other Circuit Courts of Appeals have repeatedly rejected attempts by the Commission to use its conditioning powers to impose indirectly by condition what it is otherwise without statutory authority to require or to effectuate what is otherwise prohibited by statute. *See FPC v. Texaco*, 417 U.S. 380, 394 (1974); *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 508-09 (1949); *Central West Utility Co. v. FPC*, 247 F.2d 306 (3d Cir. 1957).

This Court has held that in determining the scope of the Commission's conditioning authority, ". . . all sections of the Act must be reconciled so as to produce a symmetrical whole." *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949). Therefore, the Commission's authority to attach conditions to certificates is limited by the other substantive provisions of the Act. *California Oil Co. v. FPC*, 315 F.2d 652, 656 (10th Cir. 1963); *Sohio Petroleum Co. v. FPC*, 298 F.2d 465, 466 (10th Cir. 1961); *Pure Oil Co. v. FPC*, 292 F.2d 350, 353 (7th Cir. 1961).

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[12] *See, e.g.*, the Communications Act of 1934, 47 U.S.C. §§151, 303(r) (1982).

In addressing Commission authority to impose a condition which was expressly withheld from the FERC under the NGA, the Third Circuit in *Central West*, 247 F.2d at 311, quoted with approval the following language of the Commission:

> We cannot but conclude that if Congress had intended that we have a power of such extent and possibly far-reaching impact, the grant of such authority would be confirmed by something more specific than the general and rather standardized "conditions" provision of Section 7(e).

The Court decision below is squarely in conflict with the principle underlying the above decisions. Moreover, the decision below is equally in conflict with decisions which have applied that principle to deny FERC the power to convert private carriers into common carriers by imposing common carriage conditions on wheeling authorizations. *Richmond Power & Light v. FERC*, 574 F.2d 610 (D.C. Cir. 1978) and *Florida Power & Light Co. v. FERC*, 660 F.2d 668 (5th Cir. 1981), *cert. denied*, 459 U.S. 1156 (1983).

The rule imposing the open access condition which was approved by the Court below is also repugnant to the Constitutional guarantee of due process and in square conflict with *Frost v. Railroad Commission*, 271 U.S. 583 (1926). In *Frost*, this Court held that private motor carriers could not be constitutionally required by a state regulatory body to operate as common carriers as a condition to their use of the public highways.

The resemblance of *Frost* to this case is striking. There the carrier acting as a private carrier had a right of access to the public highways to serve customers of its *own* choosing so long as it complied with all pertinent regulations. Here, the pipeline owns the instrument of commerce and is entitled by statute (§§7(c) and 311(a)) to apply for authority to transport only for customers of its choosing which the Commission must grant if, under the NGA, the

proposed service is in the public interest, or under the NGPA, if such service meets the purposes of that statute. FERC cannot lawfully require common carriage as a condition to the recognition of those statutory rights. *Central West, supra*. There, as here, the regulator in the guise of regulating the carrier's right to use the avenues of commerce required the carrier to operate as a common carrier. There, as here, the regulator said that its action was a mere "condition" and not a requirement; the carrier was free to refuse to accept the condition. The end result in both cases is that if the condition is not accepted, the carrier cannot provide the service he desires—and is both constitutionally and statutorily entitled—to provide, and the decision below is, therefore, in conflict with *Frost*.

CONCLUSION

Since the passage of the Natural Gas Act in 1938, natural gas pipelines have been regulated as private carriers free to decide whether and on what terms to serve. Despite prior refusals by Congress to empower the FERC to impose open access and an express prohibition against doing so in the Natural Gas Policy Act, the FERC in Order 436 has achieved that result.

For the reasons advanced in this petition, a writ of certiorari should be granted and the Court of Appeals decision below should be summarily reversed.

Respectfully submitted,

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